IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,	)	
	)	No. 60336-1-I
Respondent,	)	
	)	DIVISION I
v.	)	
	)	
HUAN C. HUYNH,	)	UNPUBLISHED OPINION
	)	
Appellant.	)	FILED: July 26, 2010
_____	)	

Per Curiam. Appellant Huan Huynh was convicted of first degree manslaughter for shooting Manh Ly to death. In a special verdict, the jury found that Huynh was armed with a deadly weapon, a finding that would support a two year sentence enhancement. The trial court enhanced the sentence by adding five years for being armed with a firearm. Huynh contends the lack of a jury finding that he was armed with a firearm violated his Sixth Amendment right to a jury trial and requires a remand for resentencing with only the two year deadly weapon enhancement. In our original opinion in this appeal, we affirmed. We decided that the general verdict, considered along with the to-convict instruction, established that Huynh committed manslaughter while armed with a firearm. We

concluded the jury had made the factual finding necessary to support the five year enhancement and therefore there was no Sixth Amendment violation. Upon Huynh's petition for review, the Supreme Court remanded for reconsideration in light of State v. Williams-Walker, 167 Wn.2d 889, 225 P.3d 913 (2010). On reconsideration, we reverse and remand for further proceedings.

The charge against Huynh arose from an incident in July 1998 at Ly's house. When the police responded to a report of a shooting, they found Ly in the backseat of a car with a gunshot wound. Ly died from this injury. Huynh admitted accidentally shooting Ly while he was cleaning a gun.

The State charged Huynh with first degree manslaughter and second degree unlawful possession of a firearm. An amended information further accused Huynh of "being armed with a handgun, a firearm." Where a defendant charged with first degree manslaughter is "armed with a firearm" as defined in RCW 9.41.010, a firearm enhancement of five years must be imposed. Former RCW 9.94A.310(3) (1999), recodified as RCW 9.94A.510(3).

The trial court instructed the jury that to convict on the charge of first degree manslaughter, the State had to prove that Huynh shot Ly with a firearm:

> To convict the defendant of the crime of Manslaughter in the First Degree . . . each of the following elements of the crime must be proved beyond a reasonable doubt:
>
> (1) That on or about the 20th day of July, 1998, the defendant shot Manh Sin Ly with a firearm;
>
> (2) That the defendant's conduct was reckless;
>
> (3) That Manh Sin Ly died as a result of defendant's acts; and
>
> (4) That the acts occurred in the State of Washington.

Instruction No. 9.

The jury was also given a special verdict to determine whether Huynh was armed with a deadly weapon. The jury received an instruction on the special verdict:

> For purposes of a special verdict the State must prove beyond a reasonable doubt that the defendant was armed with a deadly weapon at the time of the commission of the crime in Count I, Manslaughter in the First or Second Degree.
>
> A pistol, revolver, or any other firearm is a deadly weapon whether loaded or unloaded.

Instruction No. 21.

The jury found Huynh guilty as charged, and returned the special verdict finding that Huynh was armed with a "deadly weapon" at the time of the commission of the manslaughter. The enhancement for being armed with a deadly weapon was only 24 months. Former RCWA 9.94A.310(4), recodified as RCW 9.94A.510(4).

The court determined that Huynh's offender score was four. Based on an offender score of four, the standard range for manslaughter was 111 to 147 months. The court imposed a sentence of 207 months, the top of the standard range plus a 60 month firearm enhancement. Huynh also received a 16 month concurrent sentence for unlawful possession of a firearm. The court imposed 24 months of community placement.

Huynh appealed. His appeal did not raise any sentencing issues. The Court of Appeals affirmed in an unpublished opinion. State v. Huynh, noted at 105 Wn. App. 1034 (2001), review denied, 145 Wn.2d 1008 (2001). The case

was mandated on December 19, 2001.

Huynh filed a personal restraint petition in May 2005, and he ultimately prevailed in our Supreme Court by showing a miscalculation of his offender score. The court concluded that the sentencing court had erroneously included in Huynh's offender score two prior juvenile adjudications for residential burglary and second degree theft. The court ordered the matter remanded to the King County Superior Court for resentencing.

Huynh was resentenced in June 2007. The parties calculated Huynh's offender score as three, not four, and determined his standard range sentence to be 102 to 136 months for the conviction of first degree manslaughter and 9 to 12 months for the unlawful possession of a firearm. The State recommended the high end of the sentence range while Huynh recommended the low end. The court imposed a high end sentence again adding 60 months for the firearm enhancement, for a total of 196 months with 12 months on the firearm possession charge running concurrently. The court again imposed 24 months of community placement.

Huynh appealed from the sentence imposed in 2007, primarily raising the issue of whether the firearm enhancement of 60 months had been properly imposed. We stayed the case pending resolution of firearm enhancement issues that were being litigated in connection with State v. Recuenco, 154 Wn.2d 156, 110 P.3d 188 (2005) (Recuenco 1), reversed, Washington v. Recuenco, 548 U.S. 212, 126 S. Ct. 2546, 165 L. Ed. 2d 466 (2006) (Recuenco

2). The stay was released in May 2008 after the Washington Supreme Court decided State v. Recuenco, 163 Wn.2d 428, 180 P.3d 1276 (2008) (Recuenco 3), and In re Personal Restraint of Hall, 163 Wn.2d 346, 181 P.3d 799 (2008).

In a statement of additional grounds filed in December 2007, Huynh requested this court to stay the appeal until the Washington Supreme Court reviewed two other pending cases. State v. Tessema, 139 Wn. App. 483, 162 P.3d 420 (2007), review denied, 163 Wn.2d 1018 (2008), and State v. Nguyen, 134 Wn. App. 863, 142 P.3d 1117 (2006), review denied, 163 Wn.2d 1053, cert. denied, 129 S. Ct. 644 (2008). There is no basis for considering his request for a further stay because the Supreme Court has now denied review of those cases.

We first address Huynh's argument that a Sixth Amendment violation occurred. He argues that the sentencing court's imposition of a firearm enhancement, which exceeded the jury's finding of a deadly weapon enhancement, violated his Sixth Amendment right to a jury trial. Williams-Walker shows this argument to be correct. Under both the Sixth Amendment and article I, section 21 and 22 of the Washington Constitution, the jury trial right requires that a sentence be authorized by the jury's verdict. Willliams-Walker, 167 Wn.2d at 896. Here, only a deadly weapon enhancement was authorized by the jury's verdict. The imposition of an unauthorized sentence cannot be harmless. Williams-Walker, 167 Wn.2d at 900-02.

Huynh next contends the resentencing court erroneously failed to

consider his request for a sentence at the low end of the standard range. The court stated:

> And the purpose for the resentencing was to correct the error in the Court's offender score, and I do not feel that I want to reconsider the sentence that I imposed at that time other than the correction of the error that was made with regard to the offender score.
>
> So I am not going to change the Court's original sentence from the high end of the standard sentencing range.

The Sentencing Reform Act of 1981 precludes challenges to sentences within the correct standard range. RCW 9.94A.585(1); State v. Mail, 121 Wn.2d 707, 710, 854 P.2d 1042 (1993). But a defendant may challenge the procedure by which a sentence within the standard range was imposed. State v. Watkins, 86 Wn. App. 852, 854, 939 P.2d 1243 (1997).

At resentencing, the State informed the court that Huynh's standard range was 102 to 136 months on manslaughter based on the corrected offender score of three. The State asked the court to impose a high end standard range sentence, while Huynh sought the low end. In imposing sentence, the resentencing court reviewed its notes of the prior sentencing from 1999. The court permitted Huynh to present information bearing on his request for a shorter sentence. After hearing and considering Huynh's plea for a lesser sentence, the court again decided that the appropriate sentence was at the high end of the standard range. The record does not support Huynh's contention that the court refused to consider a lesser sentence. The sentence was within the correct standard range of 102-136 months and is therefore not subject to challenge.

Pro se, Huynh argues the imposition of the firearm enhancement was an

error under Blakely v. Washington because the total sentence of 196 months exceeded 136 months, which is the high end of the standard range. Blakely v. Washington, 542 U.S. 296, 124 S. Ct. 2531, 159 L. Ed. 2d 403 (2004). While the top end of the standard range is the statutory maximum under Blakely when there are no jury findings to justify a higher sentence, here the jury's finding that Huynh was armed with a deadly weapon authorized the court to go above the standard range by the length of that enhancement.

Huynh makes a similar argument that a 24 month period of community placement improperly extended his total imprisonment to 220 months and because the jury's findings did not authorize the extra 24 months, it must be stricken under Blakely. He relies in part on State v. Zavala-Reynoso, 127 Wn. App. 119, 110 P.3d 827 (2005). In Zavala-Reynoso, the court vacated a sentence where the term of confinement plus the community placement term exceeded the maximum sentence possible for the defendant's drug crime. Relying on the definition of "the maximum sentence" under Blakely, Huynh asserts that the maximum sentence in Zavala-Reynoso means the maximum that may be imposed without additional jury findings.

This case is not like Zavala-Reynoso. Huynh was convicted of a class A felony, and so the statutory maximum sentence is life imprisonment. RCW 9A.32.060(2); RCW 9A.20.021(1)(a). And it is not controlled by Blakely because there is no fact finding involved when a term of community placement is added to a sentence. Rather, the law dictates that community placement automatically

applies when a defendant is convicted of a violent offense. RCW 9.94A.700(2). Because the imposition of community placement results directly from the jury's verdict of guilt, no further findings are required under Blakely.

Reversed and remanded for further proceedings consistent with Williams-Walker.

FOR THE COURT: